1984

The State of Utah v. George Albert Roybal : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,	:	
Plaintiff/Respondent	:	
vs.	:	
GEORGE ALBERT ROYBAL,	:	Case No. 19064
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a conviction and judgment of Aggravated Assault, a Third Degree Felony, in violation of §76-5-103, Utah Code Ann. (1953 as amended), in the Third Judicial District Court, the Honorable J. Dennis Frederick, Judge, presiding.

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TABLE OF CONTENTS

CASES CITED

STATUTES CITED

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STATEMENT OF THE NATURE OF THE CASE

Appellant George Albert Roybal appeals from the judgment and conviction of Aggravated Assault, a felony of Third Degree in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable J. Dennis Frederick, Judge, presiding.

DISPOSITION IN THE LOWER COURT

Appellant George Albert Roybal was tried before a jury and convicted of Aggravated Assault on February 25, 1983. Appellant waived minimum time for sentencing and was sentenced by Judge Frederick February 25, 1983 to the indeterminate period of zero to five years, confinement to begin forthwith at the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Appellant seeks reversal of the judgment rendered below or, in the alternative, a new trial.

STATEMENT OF FACTS

In the early morning hours on December 28, 1982, Mr. Sebastian, a cab driver and the victim in this case picked up three customers at Eighth West 50 South. These customers directed him to go to the Bottoms Up Lounge, also in Salt Lake City. They asked him to wait outside for a few minutes (T.16-18). After about fifteen minutes, the original customers and four more returned to the cab, the defendant among them (T.19). The defendant sat in the front seat next to the cab driver. Another passenger sat in the front seat by the door (T.21). The driver then stopped Fifth North Fourth West to drop off a couple who had been sitting in the rear seat (T.23-24).

The remaining passengers wanted to return to the lounge. At the intersection of 600 West, 300 North, Appellant Roybal pulled out a knife (T.28). Appellant did not lunge, swing, or attempt to stab with the knife (T.63). Mr. Sebastian claimed appellant held the knife six to ten inches from his body and asked if he wanted to die (T.31,32). The cab driver stopped the cab, jumped out, and ran up the street (T.33-34). He ran to a house with lights on from which he called the police (T.35).

In recounting the events, Mr. Sebastian claimed the other passenger in the front had a knife as well (T.36). Mr. Sebastian was not cut as a result of the incident, but did get pricked on his hand. Mr. Sebastian described appellant's knife as a buck knife with a blade about one inch wide and about five inches long

(T.29,59). He described the other knife as a stiletto type knife (T.60).

Neither knife could be found by the police to be presented as evidence. Over defense counsel's objections, a substitute knife and a ruler were admitted instead, a point which appellant now appeals (T.14,45).

When appellant was booked into jail, the booking officer noted he was very intoxicated (T.153). He now argues this intoxication negated the intent to assault Mr. Sebastian.

ARGUMENT

POINT I

APPELLANT WAS DENIED A FAIR TRAIL BY THE INDIVIDUAL AND CUMULATIVE EFFECT OF ALLOWING INADMISSIBLE EVIDENCE AT TRIAL.

During the trial irrelevant and prejudicial evidence was admitted over defense counsel's objection. No knife was ever recovered following the assualt (T.13). The State proferred a substitute knife. Although the trial court initially announced the potential prejudicial effect of the knife outweighed the probative value, the court eventually allowed the substitute knife to be introduced (T.45). Additionally, a ruler was admitted to show the length of the knife blade (Id.).

Rule 45 of the Utah Rules of Evidence in effect at the time of the trial stated the court had discretion to exclude evidence if the "probative value [was] substantially outweighed by the risk that its admission [would]. . . (b) create substantial danger

of undue prejudice or of confusing the issues or of misleading the jury. . . ."

There must be an abuse of discretion to reverse a trial court's admission of evidence. Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977). The principles of two Utah cases are applicable here, even though each involved the trial court's exclusion of evidence.

In Martin v. Safeway Stores, Inc., 565 P.2d 1139 (Utah 1977) this court affirmed the trial court's decision to exclude immaterial evidence on weather conditions at the airport which was twenty miles from the scene of the plaintiff's fall on an icy sidewalk. In so doing, this Court stated, "[t]he weather report. . . had very little, if any, probative value and it could have created a substantial risk of confusing the issues." Id. at 1141.

More recently, in Reiser v. Lohner, 641 P.2d 93 (Utah 1982), this Court affirmed the exclusion of possible negligence in Rh antibody testing in a medical malpractice case for harm arising from an amniocentesis test. The trial court had excluded the information because the Rh sensitivity did not cause the injury and any negligence by the doctors in diagnosis and treatment of the sensitivity was potentially prejudicial to the determination of medical negligence in causing the injuries suffered. Id. at 96-97.

In this case, each admission as well as their cumulative effect constituted an abuse of discretion by the trial court.

None of the evidence admitted here was relevant. It was presented by the State solely for its prejudicial impact.

No material fact was advanced by the admission of a substitute knife. The jury may have believed the exhibit was the actual knife recovered or exactly like the knife recovered. This was merely an attempt to prejudice the jury with irrelevant evidence. There was little probative value to this substitute knife.

The ruler which was admitted over defense counsel's objection only served to prejudice the jury. Mr. Sebastian could only describe the knife as one which was over four and under six inches long (T.59). Appellant was prejudiced by the effect of allowing the jury to measure five inches on a ruler. This served no probative value when the witness himself could not accurately describe the length of the blade. The jury was allowed to speculate needlessly regarding the length of the blade.

Each inadmissible piece of evidence, as well as the cumulative impact, created reversible error in this case. This cumulative effect, if not the individual errors, warrants a new trial. In Gooden v. State, 617 P.2d 248, 250 (Okla. Crim. App. 1980), the court stated:

> When a review of the entire record reveals numerous irregularities that tend to prejudice the rights of a defendant and where an accumulation of errors denies a defendant a fair trial, the case will be reversed, even though one of the errors, standing alone, would not be ample to justify reversal.

In Gooden, the court reversed where there was prosecutorial misconduct in cross-examination and closing argument.

The prejudicial effect of the errors in this case warrants reversal of appellant's conviction. Prejudicial evidence was erroneously admitted. Appellant is entitled to a new trial.

POINT II

THE EVIDENCE OF APPELLANT'S INTOXICATION NEGATED THE REQUIRED INTENT FOR AGGRAVATED ASSAULT.

Mr. Roybal was so intoxicated when he was booked into the jail that the booking officer had made an entry on the booking sheet describing him as very intoxicated (T.153). In the officer's opinion, Mr. Roybal fit into the highest possible category of intoxication used in the booking process (T.153-54).

Under Utah law, when intoxication negates the existence of the state of mind required for the commission of the crime, the act is "purged of its criminality." State v. Potter, 627 P.2d 75, 79 (Utah 1981) citing to §76-2-306, Utah Code Ann. (1953 as amended). When intoxication renders the accused incapable of forming the required specific intent, voluntary intoxication is a defense to the crime. 627 P.2d at 79 citing Williams v. State, Ind., 402 N.E. 2d 954 (1980).

On the facts of State v. Potter, this Court described aggravated assault as a crime of general intent. However in that case, the defendant held a gun which he pointed at the floor. Potter remained polite and never threatened the victims, nor did he raise his weapon. Id. at 77. Potter did not intentionally use his weapon in the commission of a crime. In the case at bar,

appellant intentionally used a weapon and caused fear in his victim as a direct result of using his weapon. Further, Instruction No. 11 required the jury to find appellant acted "either intentionally, knowingly or recklessly" before they convicted him of aggravated assault. It seems clear the type of behavior in this case warrants distinction from the type of behavior in State v. Potter. It follows that the behavior in the case at bar is more closely akin to a specific intent crime than a general intent crime.

Evidence indicates Appellant Roybal was incapable of forming the required specific intent and the jury ignored voluntary intoxication as a defense to the crime. Based on his inability to form the required intent, his conviction on aggravated assault cannot stand.

CONCLUSION

Appellant was denied a fair trial by the admission of a prejudicial substitute knife because the State never found the actual knife used in the assault. This prejudice was compounded by the additional admission of a ruler to show the length of the knife blade. Furthermore, the jury ignored the defense of voluntary intoxication and convicted appellant of aggravated assault even though intoxication negated the existence of the requisite mental state.

DATED this 23 day of October, 1984.

Respectfully submitted,

JAMES A. VALDEZ
Attorney for Appellant

DELIVERED a copy of the foregoing Appellant's Brief to the Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, this 23 day of October, 1984.

Connie Lemmon